FILE COPY

No. 399

In the Supreme Court of the United States

October Term, 1945

ROBERT E. HANNEGAN, AS POSTMASTER GENERAL OF THE UNITED STATES, PETITIONER

v.

ESQUIRE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE POSTMASTER GENERAL

INDEX

CITATIONS

677941—46——1

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 399

ROBERT E. HANNEGAN, AS POSTMASTER GENERAL OF THE UNITED STATES, PETITIONER

v.

ESQUIRE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE POSTMASTER GENERAL

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (R. 1963–1975) is reported at 55 F. Supp. 1015. The opinion of the United States Court of Appeals for the District of Columbia (R. 1987–1994) is reported at 151 F. 2d 49.

JURISDICTION

The judgment of the Court of Appeals was entered on June 4, 1945 (R. 1995). The petition for a writ of certiorari was filed on September 4, 1945 and was granted on October 22, 1945.

The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the fourth condition of Section 14 of the Postal Classification Act of 1879 vests in the Postmaster General discretion to determine whether a publication, offered for mailing in the second class, is "originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry."

2. Whether Congress has constitutional authority to vest such discretion in the Postmaster General.

3. Whether, assuming an affirmative answer to both of the foregoing questions, the Postmaster General's finding that Esquire Magazine does not comply with the fourth condition of Section 14 of the Classification Act of 1879 is a proper exercise of the authority conferred upon him.

STATUTES INVOLVED

Section 396 of the Revised Statutes (5 U. S. C. 369) provides, in part:

> It shall be the duty of the Postmaster General: * * *
>
> SECOND. To instruct all persons in the Postal Service with reference to their duties.
>
> * * * * * * *

NINTH. To superintend generally the business of the department and execute all laws relative to the Postal Service.

The Classification Act of 1879, 20 Stat. 358, as amended provides in part as follows:

Section 7 (39 U. S. C. 221)—

Mailable matter shall be divided into four classes:

First, written matter;

Second, periodical publications;

Third, miscellaneous printed matter and other mailable matter not in the first, second, or fourth classes;

Fourth, merchandise and other mailable matter weighing not less than eight ounces and not in any other class.

Section 10 (39 U. S. C. 224)—

Mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year and are within the conditions named in sections twelve and fourteen.

Section 14 (39 U. S. C. 226)—

Except as otherwise provided by law, the conditions upon which a publication shall be admitted to the second class are as follows: First. It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively. Second. It must be issued from a known office of publication. Third. It must be formed of printed

paper sheets, without board, cloth, leather, or other substantial binding such as distinguish printed books for preservation from periodical publications: *Provided*, That publications produced by the stencil, mimeograph, or hectograph process or in imitation of typewriting shall not be regarded as printed within the meaning of this clause. Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers. Nothing herein contained shall be so construed as to admit to the second-class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates.

Section 1 of the Act of March 3, 1901, 31 Stat. 1107 (39 U. S. C. 232) provides in part:

> When any publication has been accorded second-class mail privileges, the same shall not be suspended or annulled until a hearing shall have been granted to the parties interested.

Other relevant statutes are printed in the Appendix, *infra*, pp. 48–51.

STATEMENT

In this case the publishers of Esquire Magazine, pursuant to an amended complaint filed in the District Court of the United States for the

District of Columbia (R. 1867–1885), seek to enjoin the Postmaster General from carrying into effect an order (R. 1856–1865) by which he revoked Esquire's second-class mailing permit on the ground that the magazine does not meet the fourth condition for admission to or continuation in the second class, prescribed by Section 14 of the Postal Classification Act of 1879, *supra*, that "it must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry: * * *."

On September 11, 1943 and October 4, 1943, respectively, the then Postmaster General Frank C. Walker caused respondent to be served with original and amended citations to show cause why its second class permit should not be revoked (R. 1–10), charging that the magazine was unmailable because of the inclusion of matter "of an obscene, lewd and lascivious character; and other matter of a similar or related nature" and that "because of the inclusion of such matter in the publication it has not fulfilled the qualifications of second-class mailing privileges established by the Fourth Condition."

Hearings were thereafter held before a three-

In its order granting a writ of certiorari, sub nom. *Frank C. Walker, as Postmaster General of the United States* v. *Esquire, Inc.*, this Court granted a motion for the substitution of Robert E. Hannegan, present Postmaster General, as petitioner.

member hearing board designated by the Postmaster General, at which testimony covering over 1700 printed pages was taken, over 200 exhibits were introduced, and arguments of counsel for the Post Office Department and respondent were made. Written briefs were submitted by both sides. Two members of the board recommended that respondent's permit be not revoked (R. 1839). The third member recommended revocation (R. 1855). The board's report to the Postmaster General included the testimony, exhibits, briefs, and arguments of counsel before it. The Postmaster General entered his order, above referred to, on December 30, 1943.

The respondent's amended complaint, filed February 15, 1944 (R. 1867–1885), alleged that Esquire "satisfies, and at all times mentioned herein has satisfied, all statutory conditions for second-class mailing privileges"; that the Postmaster General misconstrued the fourth condition of the Classification Act; that he acted arbitrarily and capriciously; that his order was not supported by evidence; that the order was an unconstitutional interference with freedom of the press; that it arbitrarily discriminated against respondent in relation to other periodicals of the same general class; and that it was without statutory authority. Asserting that the order threatened irreparable injury, the respondent prayed for an injunction restraining enforcement. The Postmaster General filed an answer (R. 1887–1891) in-

corporating the proceedings before the Post-Office Department (R. 1890–1891). At a pre-trial conference (R. 1891–1893) the parties stipulated, *inter alia*, that the suit would not be defended on the ground that Esquire "is obscene within the meaning of 18 U. S. C. 334, or that it is non-mailable within the provisions of that or any other statute" and that objection would not be raised to the request for injunctive relief "on the ground that Plaintiff would not sustain irreparable damage if the order in question was wrong and invalid" (R. 1892).

After a hearing (R. 1893–1963), the District Court issued its findings of fact (R. 1976–1978), conclusions of law (R. 1978–1979), and opinion (R. 1963–1975), and on July 27, 1944, entered judgment for the Postmaster General, denying an injunction and dismissing respondent's complaint (R. 1979). The court held that: "The Postmaster General's determination that Esquire was not originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, was not clearly wrong, nor unlawfully made, nor arbitrary, capricious or unsupported by substantial evidence," and that the order did not exclude Esquire from the mails, did not impose censorship or involve any infringement of the rights of free speech and free press, and was lawful and valid (R. 1978).

The Court of Appeals reversed the District

Court, holding that the power to determine the eligibility of periodicals for second-class privileges in the manner here attempted involves an exercise of discretion which, if intended by Congress, amounts to an objectionable "censorship" probably contravening the Constitution. The opinion (R. 1987–1996) directs the Post-Office Department to confine itself to carrying the mails and not to concern itself with the character of the content of publications in determining their eligibility for second-class privileges. (R. 1995–1996).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the fourth condition of Section 14 of the Postal Classification Act does not authorize the Postmaster General to determine whether a periodical, offered for second class privileges, complies with the condition.

2. In holding that the order of the Postmaster General in this case involves the exercise of an unconstitutional power of "censorship".

3. In reversing the judgment of the District Court.

SUMMARY OF ARGUMENT

The petitioner contends that the intention of the statute is clear from its language and from judicial and legislative recognition of its purpose; that it validly confers the power here exercised; and that, contrary to the judgment of the court below, the order of the Postmaster General should stand.

I

The fourth condition of Section 14 of the Postal Classification Act, which is the statutory provision principally involved, specifies that publications admitted to the second class "must be originated and published for the dissemination of information of a public character" or be "devoted to literature, the sciences, arts, or some special industry." Either this provision requires exclusion by the Postmaster General of publications which do not conform to the requirement, or it is meaningless. The duty of determining whether a publication offered for second class privileges meets the condition rests with the Postmaster General, both by administrative necessity and because of his statutory duty to instruct persons in the Postal Service in their duties, to superintend the business of the Department, and to execute all laws relative thereto. Section 1 of the Act of March 3, 1901, *supra*, p. 4, moreover, recognizes administrative revocation of second class privileges by requiring that a hearing be held.

The conclusion of the court below, in effect denying any but mechanical functions to the Post Office Department, is contrary to the decisions of this Court in *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288; *Smith* v. *Hitchcock*, 226 U. S. 53, and *Bates & Guild Co.* v. *Payne*, 194 U. S. 106. The purpose of Congress in bestowing low postal rates upon periodicals in "the interest of dissemi-

nation of current intelligence" cannot be carried out unless differentiation between publications, guided by the statutory standard, is exercised.

II

The constitutionality of the fourth condition, quoted above, must be judged according to the nature of the governmental function involved and of the activities with which the statute deals. The function here exercised is not "censorship," but the power to provide for the Postal Service. This Court has recognized that the exclusion of material from the mails is different from its suppression, and that the exclusion of publications from second class privileges is a still less drastic measure. General regulation of what should be published, or even admitted to the mails, is not involved. The respondent is not threatened with criminal sanctions. Hence the test of constitutionality which applies must leave scope for greater legislative power than might exist in other circumstances. Particularly when it is recognized that Esquire Magazine has been found not to be devoted to literary or artistic ends, it is apparent that the bounds of constitutional power in relation to the First Amendment have not been exceeded. Neither does the statutory standard delegate legislative power to the Postmaster General. The standard prescribed is not less precise than those which have been sustained in numerous previous cases.

III

There is ample evidence in the record to sustain the order of the Postmaster General. Esquire Magazine is there shown to have commercial features and a prurient appeal which negative its compliance with the statutory condition.

ARGUMENT

The central issue in this case is the narrow but important question of whether the Postmaster General acted within his authority in revoking the second class entry of Esquire Magazine upon the ground that the publication was not "originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry," as required by Section 14 of the Postal Classification Act of 1879, *supra*, p. 4. The decision of the court below holding that the Postmaster General exceeded his authority and that he lacks power to determine the eligibility of periodicals for second class privileges in the manner here attempted, in effect reads the above quoted language out of the statute.

The Court of Appeals reached the foregoing result, not on the basis of an inquiry into the actual intent of Congress in prescribing the condition, but because of objections to the breadth of the discretion which the statute allegedly confers if construed as the Postmaster General construes it, and of the court's belief that the existence of such a

power of "censorship" would be both unwise and unconstitutional. We think, however, that the intent of the statute is clear from its language and from judicial and legislative recognition of its purpose; that it validly confers the power here exercised; and that, as the court below in effect conceded, if the statute confers the power in question the decision of the Postmaster General must stand.

I

THE STATUTE CASTS UPON THE POSTMASTER GENERAL DISCRETION TO DETERMINE WHETHER PERIODICALS OFFERED FOR SECOND-CLASS MAILING PRIVILEGES COMPLY WITH THE FOURTH CONDITION OF SECTION 14 AND TO REVOKE THE PERMITS OF SUCH AS HE FINDS, AFTER HEARING, DO NOT MEET THE CONDITION

There can be no question that the language of the statute here involved upon its face limits second class mailing privileges to periodicals which actually are "originated and published for the dissemination of information of a public character," or which are "devoted to literature, the sciences, arts, or some special industry"; or that this requirement, as this Court has noted, is stated as one of several "conditions requisite to the admission of a publication" to the second class. (*Houghton* v. *Payne*, 194 U. S. 88, 96.) Either the provision requires exclusion by the Postmaster General of publications which do not meet the stated condition, or it is meaningless. If nothing

else, the principle of construction that statutory language is where possible to be given meaning, clearly requires that the language here involved be given effect. See *Postmaster General* v. *Early*, 12 Wheat. 136; *Market Co.* v. *Hoffman*, 101 U. S. 112; 2 Sutherland, *Statutory Construction* (3d ed., 1943), § 4705; *Drummond* v. *United States*, 324 U. S. 316, 319.

The duty of determining whether a publication offered for second class privileges is eligible to receive them, rests by statute and of necessity with the Postmaster General. By Section 396 of the Revised Statutes, *supra*, pp. 2–3, he is charged with the function of instructing "all persons in the Postal Service with reference to their duties", of superintending "the business of the Department", and of executing "all laws relative to the Postal Service". Although the classification provisions of the Postal Classification Act do not explicitly state that the Postmaster General shall make the necessary determinations, it falls within his province to do so; since otherwise the postmasters would be without guidance concerning the classification of matter offered for mailing, upon which the rates to be charged are based. Section 1 of the Act of March 3, 1901, *supra*, p. 4, moreover, recognizes that the revocation of second class privileges must be administrative, since it requires that before the privileges of a publication may be suspended or annulled a hearing must be granted to the parties interested, as

was done in this case. In *Bates & Guild Co.* v. *Payne,* 194 U. S. 106, this court upheld an order of the Postmaster General denying, and in *Houghton* v. *Payne,* 194 U. S. 88, and *Smith* v. *Hitchcock,* 226 U. S. 53, orders revoking, second class mailing privileges.

The conclusion of the court below, ignoring the terms of the statute and directing that the Postmaster General should cease giving attention to the character of periodicals for the purpose of determining their eligibility for second class privileges and should confine the activity of the Post Office Department to getting the mail through (R. 1990, 1994), is reminiscent of the argument advanced in *Lewis Publishing Co.* v. *Morgan,* 229 U. S. 288, 298, that the Department's "function is to carry the mails" and not to inquire into any aspect of the affairs of newspapers and periodicals. This contention, which in effect denies all but mechanical functions to the Post Office Department, was rejected at that time and is no more valid now than then. It would nullify the requirements imposed by Congress and overlooks the procedures which are necessary to effectuate the broad power of Congress to classify the mails, which this Court stressed in the *Lewis Publishing Co.* case. See 229 U. S. at p. 313. The Court there recognized that administrative judgment is required not only to give effect to the statutory classification of mailable matter, as *Bates & Guild*

Co. v. *Payne,* 194 U. S. 106, and *Smith* v. *Hitchcock,* 226 U. S. 53, had stated, but also to the end "that the results intended to be accomplished by Congress" in laying down the four conditions for second class privileges "might be realized" (229 U. S. at 305). The results sought by Congress were stated to be implicit in the bestowal of low postal rates upon periodicals in "the interest of the dissemination of current intelligence" (229 U. S. at 313; see also p. 304);[2] and their attainment justifies the exercise of discrimination among publications.

The determination of whether publications are eligible for second class privileges involves a judgment upon their content in a number of respects. This judgment is not automatic; for although the first three conditions laid down in Section 14 of the Postal Classification Act (*supra,* pp. 3–4) relate to the physical characteristics of the publication and the manner of its issuance, other statutory requirements are of a different character.

[2] The extent of the subsidy to periodical publications which is involved in second class postal rates and which is a matter of common knowledge, has not diminished with the years. The annual report of the Postmaster General in 1941, which disclosed that first class postage revenues for that fiscal year exceeded apportioned expenditures by approximately $146,000,000, revealed a second-class deficit of $83,519,746 (Report, p. 89). In 1944 apportioned expenditures in the handling of second class mail exceeded revenues from that class by $100,439,067. Post Office Department, *Cost Ascertainment Report for 1944,* p. 8.

Section 12 of the same Act (*infra* p. 48) provides that "matter of the second class may be examined at the office of mailing and if found to contain matter which is subject to a higher rate of postage, such matter shall be charged with postage at the rate to which the inclosed matter is subject". Section 7 (*supra*, p. 3) provides for the inclusion of only "periodical publications" in the second class; and the problem of what is such a publication presents difficulties which are soluble only in the exercise of discretion on the basis of an examination of the publication's content. *Smith* v. *Hitchcock*, 226 U. S. 53; *Bates & Guild Co.* v. *Payne*, 194 U. S. 106, 107–108; *Houghton* v. *Payne*, 194 U. S. 88.

Nor is the duty cast upon the Postmaster General by the fourth condition, of giving attention to the purpose of a publication, by any means unique. The Act of July 16, 1894 (28 Stat. 105) admitted to the second class publications of benevolent and fraternal societies upon the condition *inter alia* "that such matter shall be originated and published to further the objects and purposes" of the organization. Similarly, publications of state departments of agriculture were admitted to the second class by the Act of June 6, 1900, c. 801 (31 Stat. 660, 39 U. S. C. 230) with the proviso "that such matter shall be published only for the purpose of furthering the objects of such departments". See also the similar provision of the Act of August 24, 1912 (*infra*, pp. 48–50), enlarg-

ing the class of organizations whose publications may be admitted to the second class.

The fact that drawing the line between publications which are eligible for second class privileges and those which are not is necessarily a delicate function does not negative its existence. The determination in each case turns not merely upon a judgment of the content of a periodical at a particular time, but also upon the purposes of those who publish it as revealed by its history and by the appeal which it attempts to make to prospective purchasers. The statute clearly calls for a judgment directed to the origin and purpose of the publication and the ends to which it is directed. It is reasonable to conclude, therefore, that Congress intended to leave to the Postmaster General, guided by the words of the statute, the question whether publications seeking second class privileges are of the character which Congress intended to subsidize by means of those privileges.

No other means of effecting such a differentiation has been or could be suggested. The sole practical alternatives would be to withdraw the benefits of less-than-cost service to all periodicals or to extend the subsidy indiscriminately to all that meet the remaining conditions in the statute. The latter is the alternative embraced by the court below. Congress did not intend, we believe, that this should be the outcome of its carefully-enacted provisions.

The purpose of Congress in maintaining low second class postal rates, which lends force to the already clear words of the fourth condition of Section 14 of the Postal Classification Act, has been authoritatively attested. This Court has given expression to it. *Lewis Publishing Co.* v. *Morgan, supra,* pp. 14–15, *infra,* pp. 22–24; *Milwaukee Publishing Company* v. *Burleson,* 255 U. S. 407, 410. In the debate in Congress upon the Act of 1879 it was noted that:

> * * * papers are allowed to go at a low rate of postage, * * * because they are the most efficient educators of our people. It is because they go into general circulation and are intended for the dissemination of useful knowledge such as will promote the prosperity and the best interests of the people all over the country. [8 Cong. Rec. 2135.]

In 1892 the Postmaster General referred to the "generous policy of Congress, which has always been to favor dissemination of current news and other desirable and beneficial intelligence among the people by granting a very low and unremunerative rate of postage to genuine newspapers and periodicals." Annual Report (1892) p. 71. In 1911–12 the Commission on Second-Class Mail Matter stated in its report that "the original object in placing on second-class matter a rate far below that on any other class of mail was to encourage the dissemination of news and of current

literature of educational value." H. Doc. No. 559, 62nd Cong., 2nd sess., Vol. No. 36, p. 142.[3]

It is clear, we submit, that the authority of the Postmaster General under the statute should be so construed as to give effect to the Congressional purpose—not, as the court below would have it, so as to nullify the fourth condition of Section 14 altogether. This is particularly true as respects the grounds of the Postmaster General's order in this case, which relate to a problem in the administration of the fourth condition that presents with growing acuteness the divergence between the legislative purpose and the use being made of second class privileges.

The courts themselves can scarcely be above noting judicially that the growth of trashy, prurient publications has been phenominal in recent years. The essential question in this case, from a practical standpoint, is whether the Postmaster General must permit the instrumentality which Congress created for a stated purpose to be perverted

[3] This Commission was created by a joint resolution approved March 4, 1911, 36 Stat. 1334. Previously, the Postal Commission of 1906–7 rendered a *Report Regarding Second-Class Mail Matter* (H. Doc. 608, 59th Cong., 2nd sess.) upon the second-class privilege, including recommendations for amendment of the Postal Classification Act. The reports, on the basis of previous administrative practice and the Commissions' own interpretation of the statutory language, concluded that the fourth condition of Section 14 did not provide a basis for discriminating among periodicals with reference to their enjoyment of second-class privileges.

to wholly different ends, or whether periodical publications falling outside the language employed in the statute to designate the periodicals which shall enjoy a subsidy may be dealt with in such a way as to promote the undoubted legislative purpose. It requires more than objections to administrative discretion in this field to establish that the Postmaster General is not empowered to administer the second class privilege in accordance with the ends prescribed.

It is not an objection to the interpretation for which we contend, that for a period of years the Post Office Department may not have withheld or revoked second class privileges merely for want of compliance with the fourth condition of Section 14. Not only has the Department been confronted of late with an outpouring of cartoon, "gag," and photographic magazines pandering to salacious appetites, which requires an adaptation of the standard contained in the law, but this Court has not hesitated in respect to the administration of second class privileges to give sanction even to an undoubted administrative reversal of previous policy. In *Houghton* v. *Payne*, 194 U. S. 88, this Court sustained an administrative construction which, as Mr. Justice Harlan and Chief Justice Fuller stated in their dissent, reversed a construction whereby "the Department had for sixteen years construed the statute to mean what the appellants say it plainly means and after Congress

had uniformly refused, upon full investigation, to comply with the requests of Postmasters General to so amend the statute that it could be interpreted as the Government now insists it should always have been interpreted." 194 U. S. at p. 102. The result there was to destroy a business advantage enjoyed by the publishers of inexpensive editions of undoubtedly high-grade literature. Therefore, even if it could be said that the order in the present case represents a reversal of previous departmental policy instead of an adaptation of that policy to new circumstances, it would not follow that the reversal is beyond the authorization of the statute. The meaning of the Act remains a question to be determined upon its merits in the light of the available data; and it is not foreclosed by the acts or the utterances of previous administrators and investigating bodies who may have come to a different conclusion from that which the Postmasters General have entertained during the recent past.

II

CONSTRUED AS CONFERRING THE DUTY IN QUESTION THE STATUTE IS CONSTITUTIONAL.

The constitutionality of enforcement of the fourth condition of Section 14 of the Postal Classification Act, construed as the Postmaster General construes it, must be judged according to the nature of the governmental function sought to be

exercised. That function is not, as the court below asserts, the exertion of "censorship" over publications, or even their exclusion from the mails, but simply the duty to classify them for postal purposes and to determine which ones shall enjoy the subsidy involved in second class privileges.

This Court long ago recognized that even the exclusion of writings and publications from the mails is distinctly different from the total suppression of their circulation. The latter would be "a fatal blow * * * to the freedom of the press"; but Congress may exercise a power to exclude utterances from the mails which is broader than its power to prevent circulation of the same material in other ways. *Ex parte Jackson*, 96 U. S. 727, 735; cf. *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288. The power to prevent dissemination is the power of censorship; the power to exclude from the mails, on the other hand, (and with it the lesser power to classify for postal purposes) is the power to provide for the Postal Service.

In *Lewis Publishing Co.* v. *Morgan*, *supra*, this Court recognized that the exclusion of publications from second class privileges constitutes a much less drastic measure than the total exclusion of material from the mails. In that case it was contended that a statute (*infra*, pp. 50–51) which required publications enjoying second

class privileges to file statements with the Post Office Department concerning their ownership and the names of stockholders and creditors, and required them to label paid advertisements as such, constituted an infringement of freedom of the press. The Court noted, however (229 U. S. 301, 313–314), that the power being exercised was simply that of classifying mailable matter with particular reference to second class privileges and that, then as now (see *supra*, p. 15, n. 2) inclusion within the class involved a substantial subsidy from public funds (229 U. S. 303–304). The Court then stated (229 U. S. at p. 308):

> When the question is thus defined its solution is free from difficulty, since by its terms the provision only regulates second class mail, and the exclusion from the mails for which it provides is not an exclusion from the mails generally, but only from the right to participate in and enjoy the privileges accorded by the second class classification.

Considered in this light, the statute was held to be clearly valid, since, as the Court repeated (229 U. S. 316), "we are concerned not with any general regulation of what should be published in newspapers, not with any condition excluding from the right to resort to the mails, but * * * solely and exclusively with the right on behalf of the publishers to continue to enjoy great privileges

and advantages at the public expense, a right given to them by Congress upon condition of compliance with regulations deemed by that body incidental and necessary to the complete fruition of the public policy lying at the foundation of the privileges accorded."

Equally here, the Postmaster General is exercising an authority which Congress deems essential to "the complete fruition of the public policy lying at the foundation of the privileges accorded"—a policy which encourages the circulation of periodicals designed to convey information of a public character or devoted to literature, the sciences, or the arts, but which excludes from the enjoyment of this favored position those publications that are not devoted to these ends. The fact that for the enforcement of this condition discretionary authority is conferred upon the Postmaster General raises constitutional questions additional to those in the *Lewis Publishing Co.* case; but in considering those issues, as in determining the constitutionality of the substantive policy which Congress has enacted, the actual consequences of the power which is being exercised must be kept clearly in mind.

The charge is made that the power sought to be exercised by the Postmaster General in this case infringes freedom of speech and of the press as guaranteed by the First Amendment. In cases arising under that Amendment, however, as in re-

lation to other constitutional provisions, this Court has stressed that the test of validity of legislation necessarily varies with circumstances. No rigid formulas or unvarying generalities can be applied. The line between valid and invalid statutes must necessarily be drawn in the light of "the concrete clash of particular interests and the community's * * * evaluation * * * of them." *Thomas* v. *Collins*, 323 U. S. 516, 531. The free speech decisions have recognized that the line which marks off the area of constitutionality must be most strictly drawn when criminal sanctions are invoked against speech, publication, or religious observance. *Board of Education* v. *Barnette*, 319 U. S. 624, 632; *Bridges* v. *California*, 314 U. S. 252, 260, 263. In the present case no criminal sanctions are involved. The consequence to a publication which does not meet this requirement of the statute is not even exclusion from the mails, but simply the denial of second-class privileges. Manifestly the test of constitutionality which applies in this situation, whether denominated "clear and present danger" or according to some other form of words, must leave room for greater legislative discretion than would be the case if total suppression of utterance were involved. Cf. *Ex parte Jackson*, *supra*. As respects "clear and present danger", the immediacy of the financial loss to the Government, incident to public subsidi-

zation of a periodical which Congress deems ineligible for second class privileges, is not open to doubt.

The nature of the particular activities with which a statute deals, as well as the governmental power being exercised, must be taken into account in determining the constitutionality of the statute. Thus it is one thing to limit religious observance and proselyting, but another to regulate the labor of children while engaged in religious activity. *Prince* v. *Massachusetts*, 321 U. S. 158. Similarly, the dissemination of commercial advertising may be prevented under circumstances which would not justify suppressing the distribution of literature containing opinion or information for other than commercial purposes. *Valentine* v. *Chrestensen*, 316 U. S. 52. So here, it makes a difference that Esquire Magazine, although containing literature and other material which in itself enjoys the protection of the First Amendment, has been found not to be devoted to literary, artistic, or scientific ends. Its otherwise protected content is swallowed up by a purpose which does not enjoy protection in the same degree, as the free speech of an employer may be limited under circumstances which cause it to assume the character of coercion of employees in respect to self-organization. *Labor Board* v. *Virginia Power Co.*, 314 U. S. 469, 477. When this estimate of the situation is coupled with the relatively mild

consequences of the denial of second class privileges, it is apparent, we think, that the bounds of constitutional power have not been exceeded.

Our contention here is not contrary to the stipulation in the present case that the United States would not defend the action "on the ground that plaintiff would not sustain irreparable damage if the order in question was wrongful and invalid" (R. 1892). It is established by the stipulation that the effort of the Postmaster General to exact higher postage rates from Esquire constitutes a threatened injury to respondent's business which warrants injunctive relief if the threat is illegal. This does not mean, however, that the injury would be the same as criminal punishment or total exclusion from the mails; and in determining the constitutionality of the statutory provision it is clearly necessary to take into account the precise nature of the consequences that would flow from its enforcement.[1] These are far from equivalent to those against which speech and publication have been protected in other cases.

In the cases most nearly similar with respect to the consequences of enforcement, involving attempts to suppress freedom of the press without resort to criminal sanctions in the ordinary

[1] The increased cost to Esquire of postage at other than second-class rates, if the Postmaster General's order should go into effect, would be approximately $44,000 monthly (R. 48) upon 300,000 copies which are sent through the mails to subscribers (R. 29).

sense of the term, the threatened effects upon publishers who violated the legislation were much more drastic than those which confront Esquire Magazine by reason of its failure to satisfy the fourth condition of Section 14 of the Postal Classification Act, if that provision is valid. In *Near v. Minnesota*, 283 U. S. 697, the publisher of forbidden material was threatened with injunction suits and with contempt proceedings for violation of any injunction that might issue, as this Court specifically noted, 283 U. S. at 712. In *Grosjean v. American Press Co.*, 297 U. S. 233, the device employed to strike at the newspapers which it was sought to restrict was a discriminatory tax consciously devised to exact large sums of money, uncompensated by any service to the publishers that might have justified the exaction. This is far different from the withdrawal of a subsidy such as is involved here, which simply leaves the publisher obliged to pay more nearly the value of services to be rendered, if he desires them. We submit, therefore, that nothing in the decisions which might condemn the adoption of more drastic measures than withdrawal of second class privileges with respect to the circulation of Esquire Magazine leads to the conclusion that Congress lacks the authority which it has here exercised and which the Postmaster General has validly implemented.

We do not contend that arbitrary discrimination among periodicals with respect to the enjoy-

ment of second class privileges, whether by legislative mandate or administrative action, would be constitutional. We do not rely upon expressions in the opinion of the Court in *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407, which might be interpreted as pointing in that direction. Whether the decision in that case was soundly based is not in issue here. The revocation of second class privileges which was there upheld over the dissents of Mr. Justice Holmes and Mr. Justice Brandeis was produced by the inclusion of non-mailable matter in a limited number of past issues of the newspaper involved. The question was whether in these circumstances the statute authorized the withdrawal of second class privileges as to future issues. In the present case, by contrast, the character of Esquire Magazine as a whole, as evidenced by its characteristic content over a long period of time and by the purposes of its publishers, has been made the basis of an administrative determination that the magazine is not originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, or the arts. We submit that nothing in the Constitution compels Congress, as a condition of extending possible subsidies to periodicals which serve the public purposes Congress has in mind, to extend them also to a publication which in the considered judgment of the responsible head of an Executive Department, reached after a full hearing, does

not fulfill the condition prescribed by the legislature.

The view of the court below that the attempt to classify periodicals according to the criteria laid down in the fourth condition of Section 14 of the Postal Classification Act necessarily involves the exercise of a purely personal judgment by the Postmaster General is unsound. The language employed in the statute is reasonably precise and adapted to the legislative purposes, and it can be applied according to distinctions which conform to the legislative intent. We have already pointed out (*supra*, p. 17) that these distinctions turn not merely upon a judgment as to particular items contained in a periodical, but upon an estimate of the nature and purpose of the publication as a whole. No constitutional issue of due process, based upon an allegedly arbitrary classification of periodicals, and no contention that legislative power has been invalidly delegated, can successfully be made.

In the postal statutes themselves, other provisions, conferring authority to exclude material entirely from the mails, afford less precise guidance to the exercise of discretion than the fourth condition of Section 14, yet are of unquestioned constitutionality. Section 211 of the Criminal Code, 18 U. S. C. 334, provides that "obscene, lewd, * * * lacivious, and * * * filthy" matter "shall not be conveyed in the mails or de-

livered from any post office or by any letter carrier." Similarly, Section 212 of the Criminal Code, 18 U. S. C. 335, forbids the conveyance in the mails of any postcard or any matter the outside cover or label of which contains obscene or "libelous, scurrilous, [or] defamatory" material. Section 2 of Title 12 of the Espionage Act of 1917, 40 Stat. 230, 18 U. S. C. 344, declares non-mailable any material which contains "any matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States". It has long been established that matter offered for mailing, which violates any of the foregoing prohibitions, may be administratively excluded. See *Ex parte Jackson*, 96 U. S. 727; *American Mercury* v. *Kiely*, 19 F. 2d. 295 (C. C. A. 2). The definition of material which may be excluded under these provisions is not more definite than the direction in Section 14 of the Postal Classification Act to limit second class privileges to publications which are originated and published to disseminate "information of a public character" or are devoted to "literature, the sciences, arts, or some special industry".

The fact that obscene and libelous material may be difficult to recognize was not regarded by this Court in *Near* v. *Minnesota*, 283 U. S. 697, as a sufficient ground to prevent the enforcement of "the primary requirements of decency * * * against obscene publications" (283 U. S. at p. 716) or to prevent the enforcement of libel laws

in proceedings for redress and punishment (283 U. S. at p. 719) notwithstanding the historic fact that the protection of liberty of the press against the licensing power sprang largely from the effort to shake off governmental restraints upon the publication of alleged libels, operating in advance of publication (See 283 U. S. 713-715). If punishment of libels and exclusion of libelous and obscene and treasonable matter from the mails are valid without precise definition of the meaning of these terms, the milder power to exclude from second class postal privileges upon the grounds invoked by the Postmaster General in this case, is also not vitiated by vagueness in the applicable standard.

This Court did not hesitate to sustain a similar legislative enactment, involving complete suppression of motion picture films which did not meet the requirements laid down by the legislature of Ohio as applied by a board of censors, in *Mutual Film Corp.* v. *Ohio Industrial Commission*, 236 U. S. 230. The statute there forbade the exhibition of motion picture films which were not "in the judgment and discretion of the board of censors of a moral, educational or amusing and harmless character." To the objection that the statute furnished "no standard of what is educational, moral, amusing or harmless, and hence leaves the decision to arbitrary judgment, whim and caprice", thereby "permitting the 'personal equa-

tion' to enter", this Court replied that the statutory standard derived "precision from the sense and experience of men" and thereby furnished "certain and useful guides in reasoning and conduct" (236 U. S. 245, 246. In that case as in this, the words employed in the statute could not be construed in the light of a common law background such as may be said to attach to the conceptions of libel, obscenity, or treason—vague and unsatisfactory as that is. We submit that in both instances the necessary degree of precision in the guides afforded to the administrative authorities derive from concepts which are not invalidly vague in the light of human experience.

In the *Mutual Film Corporation* case, which arose in a district court, the issues related to questions of state constitutional law, involving due process and the delegation of legislative power. The latter is, of course, the problem of Federal constitutional law which arises most prominently when the sufficiency of a legislatively prescribed standard to govern administrative action is called in question. This problem was fully reviewed by this Court in *Yakus v. United States*, 321 U. S. 414, 423–427, which cites the earlier authorities. As was there concluded, the adequacy of such guides to administrative action as "public interest," "just and reasonable rates," "fair and equitable" prices, and "public interest, convenience or necessity"

leaves little room for the contention that any reasonably precise legislative attempt to set down the criteria which are to govern administrative action fails of validity because Congress has not exercised its legislative power. And in a case where the legislative power has been exercised, administrative action which falls within the authority conferred is not arbitrary or discriminatory.

It has been stressed heretofore in this argument that the interests which turn upon the exercise of administrative authority here in question are threatened with less drastic action than may be the case in other instances of legislative measures bearing upon freedom of speech and freedom of the press. We submit, also, that the interests which here turn upon the exercise of administrative authority are not more entitled to constitutional protection against broad discretion than others which have been left to even less controlled administrative regulation. At the last term, for example, this Court sustained an exercise of state authority to refuse admission to its bar to an individual upon the ground that he did not possess "good moral character and general fitness to practice law," within the meaning of these concepts as they were deemed to be relevant to the practice of law. *In re Clyde Wilson Summers,* No. 139, October Term 1944, p. 6, fn. 10 of slip opinion. The rule of court involved in that case is typical of

the expressions used in licensing statutes. Freund, *Administrative Powers over Persons and Property* (1928) p. 100.

In the face of these authorities, it would sound strange to say that Congress is not entitled to provide for the administration of the Postal Classification Act in such a manner as to give effect to the criteria which are embodied in the fourth condition of Section 14. These criteria, like others, derive precision from experience and may legitimately be made the basis of evolving administrative policies.[5] The legislative provision here involved does not suffer because it may be impossible to lay down a dictionary definition of literature, science, or art within the meaning of the statute. See *Smith* v. *Hitchcock*, 226 U. S. 53, 59; *Houghton* v. *Payne*, 194 U. S. 88, 97. In the latter case, the Court noted that while it may be difficult to draw a line between periodicals and books, "it is usually, though not always, easy to determine within which category" a particular publication falls. So here, the proper classification of periodicals with respect to second class privileges may validly be left to case-by-case determination.

[5] See the suggestion in Riesman, *Civil Liberties in a Period of Transition*, in *Public Policy*, Volume III, 1942, at p. 35, that it may be possible "to shape a public policy on the basis of an investigation of the socio-psychological effects, if any, of commercially promoted pornography, and of the methods and effects of attempting to suppress it."

III

THE POSTMASTER GENERAL'S ORDER IS WITHIN THE AUTHORITY CONFERRED UPON HIM AND IS VALID

The opinion of the court below appears to concede (R. 1993) that if "the power claimed by the Post Office Department" and exercised in this case exists, "the Government is clearly right in its contention" that a court may not review the Postmaster General's conclusion in a particular case and that the testimony supporting the order cannot be brushed aside as insubstantial. We submit that this is true and that if, as we contend, the statute validly confers the power to reject periodicals for second class privileges because of failure to comply with the fourth condition, the Postmaster General's order must stand.

The general rule that courts will not interfere with administrative decisions of the heads of executive departments unless they are fraudulent, or palpably wrong, or wholly outside their authority is well recognized. It is based on respect for the separation of judicial and administrative functions and an appreciation of the significance of a grant of discretion which would become meaningless were the courts to give effect to their views as though the problem were presented first to them. The rule is stated in *Bates & Guild Co.* v. *Payne*, 194 U. S. 106, 109, with citation of the earlier cases upon which it rests, as follows:

> * * * where the decision of questions of fact is committed by Congress to the

> judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing.

In *Leach* v. *Carlile*, 258 U. S. 138, this Court characterized a decision of the Postmaster General that the plaintiff's advertising was such a gross exaggeration as to justify a fraud order, as a decision of fact "which the statutes cited committed to the decision of the Postmaster General." As to the scope of review the court said (pp. 139–140):

> * * * the applicable, settled rule of law is that the conclusion of a head of an executive department on such a question [of fact], when committed to him by law, will not be reviewed by the courts where it is fairly arrived at and has substantial evidence to support it, so that it cannot justly be said to be palpably wrong and therefore arbitrary.[6]

[6] To the same effect see *United States ex rel. Reinach* v. *Cortelyou*, 28 App. D. C. 570, involving a determination that a periodical was primarily designed to advertise the publishers business; *Shoemaker* v. *Burke*, 92 F. 2d 205 (App. D. C.), involving construction of U. S. C. Title 18, § 335, declaring material nonmailable which is intended to reflect injuriously on character or conduct; and *Masses Publishing Co.* v. *Patten*, 246 Fed. 24 (C. C. A. 2); *Gitlow* v. *Kiely*,

We think it is evident that the same principles limiting judicial review of the Postmaster General's orders, are applicable in this case.

In considering the issue of the validity of the Postmaster General's order it is important to keep in mind that its stated conclusion is solely that Esquire does not fulfill the requirements of the fourth condition. The Postmaster General did not claim to have nor seek to exercise a right of censorship, nor the right to admit or exclude periodicals according to his personal standards of what is moral or desirable, as charged in the briefs and arguments of the respondent in the court below.

The order, after reciting the formal notice and referring to the prior proceedings, states clearly the issue to which the Postmaster General directed his remarks, namely, "The single issue is the character of the publication and whether that publication meets the conditions set out by Congress in respect to its use of the second-class mailing privileges" (R. 1857), either because it was not originated and published for the dissemination of information of a public character nor devoted to literature, the sciences, arts or some special

---

44 F. 2d 227 (S. D. N. Y.), affirmed without opinion 49 F. 2d 1077 (C. C. A. 2), certiorari denied, 284 U. S. 648; *Branaman* v. *Harris*, 189 Fed. 461 (W. D. Mo.); *Anderson* v. *Patten*, 247 Fed. 382 (S. D. N. Y.), *Jeffersonian Publishing Co.* v. *West*, 245 Fed. 585 (S. D. Ga.), involving rulings as to whether material violated the statute against urging treason, insurrection, etc.

industry, or because it was non-mailable within the obscenity statutes (R. 1858). There is no further reference anywhere in the opinion to the obscenity charge and quite unmistakably the ultimate conclusion is confined to the question of compliance with the fourth condition.

After calling attention to the fact that second class rates represent a subsidy contributed to by the people of the United States, and to the declaration of the statutes and of the Supreme Court that second class carriage is a special privilege justifiable as an encouragement of the dissemination of current intelligence and other material of a nature designed to make a special contribution to the public welfare, the Postmaster General directs his attention to an analysis of the meaning of the fourth condition. He states and rejects both the theory of the respondent that Congress intended as a matter of national policy to foster and subsidize every kind of periodical irrespective of its contribution to the public welfare, and the "contrary theory" (R. 1860) which goes to the other extreme that the fourth condition establishes a "continuing requirement that a publication must serve a useful public purpose, editorially or otherwise", and that "literature, the sciences, arts" means "classic literature," the "fine arts" and the "useful arts."

The opinion continues with the statement that the decisions and administrative practice are inconsistent with themselves and with each other

and that there is no clear judicial definition of the limits of the Postmaster General's power and duty; contains a discussion of the importance to the Department and to the public of a determination by the courts of "what this statute means and what limits and restrictions there are upon the use of the second-class mail privileges" or "what restrictions and limitation in the public interest are proper to be placed upon" the "power and duty" of the Postmaster General; and finally comes to a statement of what the Postmaster General believes to be the meaning of the statute, viz: "The plain language of this statute does not assume that a publication must in fact be 'obscene' within the intendment of the postal obscenity statutes before it can be found not to be 'originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry.'" (R. 1861–1862.) There is allusion to giving attention to the preponderant or dominant quality or impact of a publication as a whole and to the fact that improper material in isolated instances may be considered of lesser importance, but that such material offends against the terms of the fourth condition when it reflects the systematic, deliberate, and dominant purpose and quality of the publication as a whole. While there is reference in this part of the discussion to a "duty to contribute to the public good and the

public welfare" (R. 1863), it is clear that these words are neither a statement of the ground of decision nor of the test applied, but merely refer to the basic purpose or objective "which Congress intended by the fourth condition."

That the ultimate decision and order were clearly based upon the fourth condition and on the Postmaster General's evaluation of the over-all impact and predominant quality of Esquire Magazine is clear from the final words (R. 1864–1865):

> Whatever the featured and dominant pictures, prose, verse and systematic innuendoes of this publication may be, they surely are not "information of a public character" or "literature, the sciences, arts or some special industry." I am unable to conclude that this publication complies with the Fourth condition or that Congress did intend or now intends that this publication be entitled to enjoy the second-class mailing privileges. I cannot assume that Congress ever intended to endow this publication with an indirect subsidy and permit it to receive at the hands of the government a preference in postal charges of approximately $500,000 per annum.

The Postmaster General's evaluation of Esquire is amply supported by the evidence and the exhibits. The history of the magazine and a description of its editorial policies and purpose were given in considerable detail by Arnold Gingrich, one of its founders and its present editor,

over whose desk all material passes (R. 1187, 1197). It appears from his testimony that Esquire started, not as a magazine or periodical, but solely as a medium for advertising men's attire (R. 978, 986), in the form of a "magazine for men" wherein the commercial material was "diluted" with humor and articles of a "stag party type" (R. 983, 1160). A relatively small number of the original issue were placed on newsstands to test the public reader reaction (R. 985), as distinguished from distribution among merchants of men's attire as originally intended (R. 984, 1159). There resulted an enormous demand with the result that it was decided to continue the publication as a magazine (R. 986). Mr. Gingrich testified that Esquire became "typed" (R. 1163) by its "original extreme emphasis on the exclusively masculine type of feature and emphasis in all the magazine's literary and humor content" (R. 1163), with respect to which it was conspicuously successful (R. 1164). It attracted a considerable number of imitators of its "smoking-room type of humor" and "girl-gag content" (R. 1163), i. e., "leg art, * * * sex jokes, chorus girls, gold-diggers, and that sort of thing" (R. 1284). Because of this imitation Esquire decided that while preserving "smartness" it would try to "get away from that type of" character (R. 1163) to a "balanced blend" as its "editorial formula" (R. 1165, 1285). However,

Congress by requiring that a periodical be "devoted" to literature, the sciences, or arts as a condition of admission to the second class, did not, we submit, indicate an intention to subsidize "balanced blends" of salacious smartness in cartoons, jokes, and pictures with honest literary and artistic effort.

Another feature to which Esquire is devoted is the "Varga girl" paintings of semi-draped girls. The first Varga girls appeared in December, 1940 (R. 1216), and the practice since then has been to print a group of twelve Varga-girl pictures (one for each month of the year) in the January issue, after two or three of these pictures have been printed in the December issue as a "preview" (R. 1216–17). In the January 1941 issue a coupon was printed offering bound reprints of the series for 25 cents. Although only 25,000 sets had been printed to meet the estimated demand, 327,000 sets were sold in 1941; in 1942 (when two advertisements were run) 504,000 sets were sold; in 1943 (when two or three advertisements appeared in each issue of Esquire) 1,000,000 sets were sold; and in 1944 the total reached 2,500,000 sets (R. 1395–6). The Varga-girl calendars are put out in many forms—the basic calendar, the desk calendar, the wall calendar (R. 1217) and for business firms for their own advertising purposes (R. 1396). The same or similar paintings are also put out on playing cards and oversized post cards (R. 1293); and all are extensively ad-

vertised in several places in each issue of the magazine (See Exhibits 1–11). Respondent has created a special department known as the "Varga Girl Calendar Sales Division" (R. 1293), which handles the calendars and the many other items of respondent's merchandise—Hurrell photographs, Szyk cartoons, sporting pictures, collections of miscellaneous cartoons, date books, men's fashion color charts and style books, cook books, jig saw puzzles, etc. (See Exhibit 28, R. 1293–1296, 1397, and advertisements in Exhibits 1–11.) This sales division employs agents on a regional basis around the country (R. 1217) and sells on news-stands (in 1943, 700,000 copies of the calendar were sold on news-stands (R. 1396)); but "the increasing sale of the Varga calendars * * *" was very largely accounted for through the magazine itself" (R. 1294).

The respondent's view as to the Varga girls is that "we do not contend that we publish them as art"; they are "frankly published for the entertainment they afford." (R. 38.)

Esquire has not infrequently stepped over the line into obscenity, with consequent suppression of particular items or issues. The July and November, 1937, issues were held non-mailable (R. 1265, 1312), and Esquire's attention was called to the condition of second class mailing that the magazine must be issued at stated intervals and was warned that if it persisted in publishing non-mailable issues action would be taken to revoke

its permit (R. 1415-7). The November 1940, issue was held to "completely overstep the line," and the inspector recommended reference to the United States Attorney (R. 1305–6, 1417). The December 1940, issue was held up because of the jingle printed on p. 1770 of the Record. Mr. Gingrich flew to Washington and, with the patient collaboration of the Solicitor's office of the Department, an acceptable revision was worked out. Beginning with the issue of January 1941, and continuing through that of July 1942, the Post Office insisted that Esquire submit its drawings in advance of publication in an attempt to avoid the necessity and difficulty of suppression after mailing (R. 1263). During this period deletions or changes of material as presented or in the drawings was insisted on in the issues of August 1941 (R. 1313, 1315–16), October 1941 (R. 1319), November 1941 (R. 1319–25), January 1942 (R.1326–7), March 1942 (R. 1327), April 1942 (R. 1328), May 1942 (R. 1329) and July 1942 (R. 1330). On May 21, 1942, the Department wrote respondent that it declined to continue premailing examinations and that full responsibility must be assumed by respondent, and suggested that "a sense of deceney and good morals should compel" the omission of any matter about which there might be doubt as to mailability (R. 1332).

Much of the evidence in the record consists of testimony of witnesses concerning their opinion of the propriety or impropriety of specific mate-

rial in Esquire and concerning their views of the Magazine as a whole. The testimony of the following witnesses supports the view adopted by the Postmaster General: Reverend Peter Marshall (R. 1567–1589), who emphasized the injurious effect upon public morals "of material in Esquire" and of the "editorial policy and tone of the magazine" (R. 1568–1569, 1575); Rabbi Solomon H. Metz (R. 1593–1633), who regarded the cumulative effect of material in Esquire as particularly harmful (R. 1601); Reverend John W. Rustin (R. 1656–1679), who gave his opinion that pictures in Esquire are not information of a public character (R. 1659); Father Thomas V. Moore (R. 1715–1762), who also believed that material which he read in Esquire is "most certainly not" information of a public character (R. 1724); Mrs. Harvey W. Wiley (R. 1680–1696); Bishop Edwin Holt Hughes (R. 1697–1715); Mr. Chester W. Holmes (R. 1634–1652); Dr. Benjamin Karpman (R. 1420–1551); and Dr. John K. Cartwright (R. 1553–1566).

In light of the evidence in support of the order, we think it is clear that, notwithstanding contrary testimony in behalf of Esquire, the order has ample support. Far from being "clearly wrong," it reflects a valid judgment.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the court below should be reversed.

J. HOWARD MCGRATH,
Solicitor General.
JOHN F. SONNETT,
Assistant Attorney General.
MARVIN C. TAYLOR,
Attorney.

VINCENT M. MILES,
Solicitor, Post Office Department.

January, 1946.

APPENDIX

RELEVANT STATUTES

39 U. S. C. 225:

> Matter of the second class may be examined at the office of mailing, and if found to contain matter which is subject to a higher rate of postage, such matter shall be charged with postage at the rate to which the inclosed matter is subject. Nothing herein contained shall be so construed as to prohibit the insertion in periodicals of advertisements attached permanently to the same (Mar. 3, 1879, c. 180, § 12, 20 Stat. 359).

39 U. S. C. 229:

> All periodical publications issued from a known place of publication at stated intervals, and as frequently as four times a year, by or under the auspices of a benevolent or fraternal society or order organized under the lodge system and having a bona fide membership of not less than one thousand persons, or by a regularly incorporated institution of learning, or by a regularly established State institution of learning supported in whole or in part by public taxation, or by or under the auspices of a trades-union, and all publications of strictly professional, literary, historical, or scientific societies, including the bulletins issued by State boards of health, and by State boards or departments of public charities and corrections, shall be admitted to the mails as second-class matter, and the post-

age thereon shall be the same as on other second-class matter; and such periodical publications, issued by or under the auspices of benevolent or fraternal societies or orders or trades-unions, or by strictly professional, literary, historical, or scientific societies, shall have the right to carry advertising matter, whether such matter pertain to such benevolent or fraternal societies or orders, trades-unions, strictly professional, literary, historical, or scientific societies, or to other persons, institutions, or concerns; but such periodical publications, hereby permitted to carry advertising matter, must not be designed or published primarily for advertising purposes, and shall be originated and published to further the objects and purposes of such benevolent or fraternal societies or orders, trades-unions, or other societies, respectively; and all such periodicals shall be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications. The circulation through the mails of periodical publications issued by, or under the auspices of, benevolent or fraternal societies or orders, or trades-unions, or by strictly professional, literary, historical, or scientific societies, as second-class mail matter, shall be limited to copies mailed to such members as pay therefor, either as a part of their dues or assessments, or otherwise, not less than 50 per centum of the regular subscription price; to other bona fide subscribers; to exchanges, and 10 per centum of such circulation as sample copies. When such members pay therefor as a part of their dues or assessments, individual subscrip-

tions or receipts shall not be required. The office of publication of any such periodical publication shall be fixed by the association or body by which it is published, or by its executive board, and such publication shall be printed at such place and entered at the nearest post office thereto (Aug. 24, 1912, c. 389, § 1, 37 Stat. 550).

39 U. S. C. 230:

All periodical publications issued from a known place of publication at stated intervals as frequently as four times a year by State departments of agriculture shall be admitted to the mails as second-class mail matter: *Provided,* That such matter shall be published only for the purpose of furthering the objects of such departments: *And provided further,* That such publications shall not contain any advertising matter of any kind (June 6, 1900, c. 801, 31 Stat. 660).

Act of August 24, 1912, c. 389, sec. 2, 37 Stat. 553:

* * * * * * *

That it shall be the duty of the editor, publisher, business manager, or owner of every newspaper, magazine, periodical, or other publication to file with the Postmaster General and the postmaster at the office at which said publication is entered, not later than the first day of April and the first day of October of each year, on blanks furnished by the Post Office Department, a sworn statement setting forth the names and post office addresses of the editor and managing editor, publisher, business managers, and owners, and, in addition, the stockholders, if the publication be owned by a corporation; and also the names of known bondholders, mortgagees,

or other security holders; and also, in the case of daily newspapers, there shall be included in such statement the average of the number of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months: *Provided,* That the provisions of this paragraph shall not apply to religious, fraternal, temperance and scientific, or other similar publications: *Provided further,* That it shall not be necessary to include in such statement the names of persons owning less than one per centum of the total amount of stock, bonds, mortgages, or other securities. A copy of such sworn statement shall be published in the second issue of such newspaper, magazine, or other publication printed next after the filing of such statement. Any such publication shall be denied the privileges of the mail if it shall fail to comply with the provisions of this paragraph within ten days after notice by registered letter of such failure.

That all editorial or other reading matter published in any such newspaper, magazine, or periodical for the publication of which money or other valuable consideration is paid, accepted, or promised shall be plainly marked "advertisement." Any editor or publisher printing editorial or other reading matter for which compensation is paid, accepted, or promised without so marking the same, shall upon conviction in any court having jurisdiction, be fined not less than fifty dollars ($50) nor more than five hundred dollars ($500).

U. S. GOVERNMENT PRINTING OFFICE: 1949